



MATTHEW L. SCHWARTZ  
Tel.: (212) 303-3646  
E-mail: mlschwartz@bsfllp.com

May 3, 2023

**BY ECF AND EMAIL**

Hon. Katherine Polk Failla  
United State District Judge  
Thurgood Marshall United States Courthouse  
40 Foley Square, Courtroom 618  
New York, New York 10007  
Failla\_NYSDChambers@nysd.uscourts.gov

**MEMO ENDORSED**

**Re: Walmart Inc., et. al. v. Capital One, N.A., Case No. Case No. 23-cv-02942-KPF**

Dear Judge Failla:

We represent Plaintiffs (collectively, “Walmart”) and write in opposition to Defendant Capital One’s request to adjourn the pre-motion conference scheduled for tomorrow. ECF No. 51. First, as Walmart has explained (ECF Nos. 34, 49), there is a need for prompt resolution of Walmart’s claims pursuant to Rule 57. This need is underscored by Capital One’s stated position that it will not comply with its post-termination contractual obligations absent a determination of Walmart’s right to terminate the Contract at issue. Capital One’s delay tactics obstruct Walmart’s contractual rights. And each passing day during which Capital One refuses to recognize those rights puts Walmart at further risk of harm.

Second, Capital One’s request to adjourn the pre-motion conference is based on the argument that it should be permitted to file a responsive pleading before any briefing schedule is set. But the Court already recognized that no responsive pleading needs to be filed prior to the conference when it stayed Capital One’s responsive pleading deadline. ECF No. 35. If Capital One nonetheless feels compelled to respond prior to the conference, there is nothing preventing it from “promptly fil[ing] its response to Walmart’s Amended Complaint in advance of May 4th”, as it offered to do in its letter motion (*see* ECF No. 51 at 1) or simply advising the Court of the basis of its purported counterclaims at the conference on Thursday.

If the Court nonetheless chooses to adjourn the hearing, Walmart respectfully requests that the Court not reschedule the hearing for Monday, May 8, or Tuesday, May 9, as counsel for Walmart is presenting oral argument to the Second Circuit on Tuesday morning in another matter.

Respectfully,

/s/ Matthew L. Schwartz  
Matthew L. Schwartz  
Jesse Panuccio (*pro hac vice*)

BOIES SCHILLER FLEXNER LLP

The Court is in receipt of the Amended Complaint (Dkt. #48, 50) and Plaintiffs' supplemental letter (Dkt. #47, 49), both of which were filed yesterday afternoon. The Court is also in receipt of Defendant's request for an adjournment of the pre-motion conference from tomorrow to next week (Dkt. #51), and Plaintiffs' letter opposing such request (Dkt. #52).

The Court is mindful of Plaintiffs' concern that delay in the resolution of this matter will cause them harm. But the Court wishes for Defendant to have a full opportunity to respond to Plaintiffs' most recent filings, and is also concerned that proceeding with tomorrow's conference will actually slow the resolution of this matter, as it would be most efficient to resolve both Plaintiffs' claims and Defendant's counterclaims at once (if the parties indeed anticipate motion practice on all such claims).

Accordingly, in order to afford Defendant an opportunity to respond to Plaintiffs' May 2, 2023 letter (Dkt. #47, 49) and to file its answer and counterclaims, the pre-motion conference currently scheduled for May 4, 2023 is hereby ADJOURNED to 2:30 p.m. on **May 16, 2023**. The Court will not set a deadline for Defendant to file its responsive pleading at this time, but credits its representation that it will file such pleading this week.

Any party that anticipates motion practice on Defendant's counterclaims at this time shall file a pre-motion letter on or before **May 10, 2023**. Any responsive letters shall be file on or before **May 12, 2023**.

Separately, Plaintiffs' sealing application is GRANTED. The Clerk of Court is directed to maintain docket entries 49 and 50 under seal, viewable only to the parties and the Court.

The Clerk of Court is directed to terminate the motions at docket entries 46 and 51.

Dated: May 3, 2023  
New York, New York

SO ORDERED.

A handwritten signature in blue ink, reading "Katherine Polk Failla".

HON. KATHERINE POLK FAILLA  
UNITED STATES DISTRICT JUDGE